

Moreover, while the rule would seem to permit greater common ownership of stations in neighboring communities, it would appear not to permit common ownership of stations in the same community, where Grade A contours almost always overlap. Common ownership of stations in the same community presents opportunities for the greatest economic efficiencies.

The Commission's second option, permitting common ownership only of UHF stations with overlapping contours, is intended to benefit UHF station owners. However, it would prevent mergers between strong VHF and weak UHF, which might be more effective in improving the service of local broadcasters, including UHF. More fundamentally, we believe this option's apparent emphasis on the financial well-being of UHF station owners alone is misguided. The wiser course is to adopt rule changes that benefit all local broadcasters by permitting them a greater degree of flexibility to choose the business combinations that are suited to their markets. Moreover, with the continued growth of cable systems that carry both UHF and VHF stations, and the advent of ATV,^{50/} UHF/VHF distinctions may become less significant, so that perpetuating these distinctions unnecessarily in regulations could be shortsighted.

^{50/} The anticipated conversion to ATV broadcasting will likely eliminate many technical distinctions between UHF and VHF.

The Commission's third option would allow a UHF/VHF station combination as long as a minimum number of separately owned stations remain in a market after the proposed combination. Like the preceding option, this option's emphasis on the UHF/VHF distinction may not provide local broadcasters with the broader flexibility that is justified.

Finally, a rule modification that ties the number of local stations that one entity can own to the total number of stations in the market is inadequate because it does not consider the share of the viewing market that the broadcaster controls.^{51/} It treats all stations the same, regardless of their coverage areas or audience shares, even though the audience shares of individual stations are significant in determining a local broadcast market's concentration, which is important in analyzing the competitive and diversity effects of ownership.^{52/}

NTIA proposes that the Commission use an audience share cap to determine how many local stations a broadcaster can own in a particular instance. Audience share is a better measure of a broadcast station owner's effect on diversity and competition

^{51/} This criticism also applies to the third option discussed above.

^{52/} See Network Inquiry, supra note 23, at 362-366.

than the number of stations owned.^{53/} Thus, NTIA recommends that an audience share cap, either alone or perhaps combined with a criterion based on the number of unaffiliated stations remaining in the market, be adopted to replace the current duopoly rule. The FCC should specify the audience share cap on the basis of the full record compiled in this proceeding.^{54/} If the record in this proceeding does not provide an adequate basis on which to determine an appropriate audience share cap, the Commission should issue a supplemental notice on this issue.

53/ In the recent radio ownership proceeding, some commenters criticized the Commission's proposal to rely on audience survey data in new local radio ownership rules. See Petition for Partial Reconsideration and Clarification of National Association of Broadcasters at 5, 17 (filed May 29, 1992) in Radio Report and Order; Joint Petition for Reconsideration and Clarification of Adventure Communications, Inc. et al at 2-11 (filed May 29, 1992) in Radio Report and Order. Although use of audience share caps might create some administrative burden, they are a more accurate measure of market activities, and potential market power, than the Grade A or Grade B contours. Moreover, many of the criticisms levelled against use of the caps in the radio proceeding are inapplicable with respect to television. Industry sources state that the determination of television markets by ratings services (Arbitron and Nielsen) are more representative of a television station's actual service area than Arbitron's radio market definitions. Comments of National Association of Broadcasters at 7-8 (filed Aug. 5, 1992) in Radio Report and Order. Thus, use of television audience survey data should more reliably indicate market share than would similar radio data. Even so, we encourage the Commission to carefully monitor the methodologies of ratings services used to implement a cap to ensure that the data they provide is accurate and impartial.

54/ NTIA recommends that the Commission make clear that if a group owner of commonly owned local stations exceeds the audience share cap because of internal growth after acquisition of a station, divestiture of that station would not be required.

IV. THE COMMISSION SHOULD ELIMINATE THE RADIO-TELEVISION CROSSOWNERSHIP RULE

The radio-television crossownership (or "one-to-a-market") rule prohibits common ownership of radio and television stations in the same market.^{55/} The Commission's original reason for adopting this rule, like the duopoly rule, was to promote diversity of programming and competition in the local marketplace.^{56/} In 1989, the Commission revisited the radio-television crossownership rule,^{57/} adopting an expanded waiver policy and noting that "the communications industry is undergoing ... rapid change."^{58/} At that time, the Commission said that it was using "an incremental approach ... [i]n an abundance of

^{55/} 47 C.F.R. § 73.3555(b) (1991). In 1989, the Commission relaxed the rule by adopting a policy under which it grants waiver applications for common ownership of radio and television stations in the same market if (1) the request involves a station combination in one of the top 25 television markets and there will be at least 30 separately owned, operated, and controlled broadcast licensees after the merger, or (2) the request involves a "failed" station that has not been operated for a substantial period of time or that is involved in bankruptcy proceedings.

^{56/} Amendment of Sections 73.35, 73.240 and 73.636 of the commission's Rules Relating to multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order, 22 FCC 2d 306, 310 (1970), on recon., 29 FCC 2d 662 (1971). Indeed, the Commission viewed the rule as an extension of its duopoly rule. Id.

^{57/} See 1989 Multiple Ownership Report, 4 FCC Rcd at 1741; Amendment of Section 73.3555 of the Commission's Broadcast Multiple Ownership Rules, Memorandum Opinion and Order, 4 FCC Rcd 6489 (1989).

^{58/} 1989 Multiple Ownership Second Report, 4 FCC Rcd at 1754.

caution ... in order to have a period of time in which to assess the ramifications of relaxing the ... prohibition."^{59/}

NTIA believes that the time has come to eliminate the rule. The number of programming outlets has continued to increase. As we have stated,^{60/} more than half (fifty-eight percent) of all households now receive at least ten over-the-air broadcast television signals, compared to four percent in 1964.^{61/} The average listener now has access to a plethora of radio voices in the local market -- the average number of commercial radio stations in the top twenty-five radio markets is approximately fifty; the average number of stations in markets seventy-six to one hundred is approximately twenty-three; and for markets 176 to 200, there are at least nine commercial radio stations in each.^{62/}

The Commission proposes the following options for changing the radio-television crossownership rule: eliminate the rule; remove the rule only for TV/AM combinations; modify the rule to permit ownership of one AM, one FM, and one television station in the same market; or expand the waiver criteria adopted in 1989 and apply them to any market, not just the top twenty-five

^{59/} Id. at 1754.

^{60/} See supra at p. 16.

^{61/} Notice, 7 FCC Rcd at 4115.

^{62/} Radio Report and Order, 7 FCC Rcd at 2773-74.

markets, to allow cross-ownership if thirty independent voices remain after the combination.^{63/}

Repeal of the crossownership rule would permit commonly-held radio and television broadcast operations to consolidate administrative functions, thus reducing costs, and could lead to more diverse and locally-targeted programming. Studies from the mid-1980s found that consolidation of radio and television stations can produce the same types of economic efficiencies as consolidation of only radio or only television stations might.^{64/} To the degree that concerns about local competition and diversity remain, the local ownership rules for radio stations^{65/} and the revised rules for local ownership of television stations we propose herein should be more than adequate to address them.^{66/}

^{63/} See Notice, 7 FCC Rcd at 4116-17.

^{64/} See, e.g., Harrison, Bond & Pecaro, Benefits from Joint Ownership of a Radio and Television Station in the Same Market (June 1987) (prepared for the National Association of Broadcasters).

^{65/} National and Local Radio Ownership Rules Modified on Reconsideration (MM Dkt. No. 91-140), FCC News Release No. 24293 (Aug. 5, 1992).

^{66/} In other words, we do not think that any combination of broadcast properties that would be permitted under the separate local limitations on radio and television ownership raise concerns about concentration or diversity that warrant an additional limitation on the basis of "cross-ownership."

V. THE COMMISSION SHOULD MODIFY THE "DUAL NETWORK" RULE

Section 73.658(g) of the Commission's rules precludes a television station from affiliating with a network that operates simultaneously more than one network in the same geographic area.^{67/} Viewed from the network perspective, the rule bars an entity from operating more than one network in a single broadcast market.^{68/} First promulgated for television in 1946,^{69/} this "dual network" rule was "intended to promote program diversity by ensuring that a single organization does not dominate the broadcast services in an area by the operation of [multiple] networks."^{70/} It was also designed to preserve competition in the advertising market.^{71/} The Commission was concerned that television broadcast networks could use their dominant position in these areas to insulate themselves from competition in the form of new broadcast networks and programming sources.^{72/}

67/ See 47 C.F.R. § 73.658(g) (1991).

68/ The term "network" encompasses "any national or regional network and appears to include within its scope, . . . 'the simultaneous broadcasting of an identical program by two or more connected stations.'" The Applicability of 47 C.F.R. § 73.658(g) and 47 C.F.R. § 73.658(k) to Home Shopping Inc., Memorandum Opinion and Order, 4 FCC Rcd 2422 (1989) (Home Shopping).

69/ Amendment of Part 3 of the Commission's Rules, 11 Fed. Reg. 33 (1946). The rule was adopted for radio in 1941. See Report on Chain Broadcasting, Dkt. No. 5060 (1941). It was then repealed in 1977. See Network Broadcasting by Standard AM and FM Stations, 63 FCC 2d 674 (1977).

70/ Home Shopping, 4 FCC Rcd at 2423.

71/ See id.

72/ See Notice, 7 FCC Rcd at 4117.

The Commission has in the recent past reexamined broadly the role of television networks in the mass media. For example, after a controversial and difficult proceeding on its financial interest and syndication rules, the Commission found in 1991 that although the television marketplace has been transformed over the past two decades, the emergence of additional programmers and distribution media has not eliminated the "continued, unique position" of broadcast networks -- especially the three largest national networks, ABC, CBS, and NBC -- in the television industry.^{73/} Although this conclusion is not incontrovertible, it does suggest that the Commission act cautiously in addressing the dual network rule. Accordingly, rather than rearguing the broad factual and legal issues regarding the national broadcast networks that the Commission has considered in other recent proceedings, NTIA proposes two specific changes to the dual network rule.

First, the rule uses an exceedingly broad definition of the term "network," which includes "the simultaneous broadcasting of an identical program by two or more connected stations."^{74/} However, in the financial interest and syndication proceeding, the Commission's analysis of the competitive issues associated with the three national networks was predicated on their

73/ See Evaluation of the Syndication and Financial Interest Rules, Report and Order, 6 FCC Rcd 3094, 3109 (1991) (Finsyn Report and Order).

74/ Home Shopping, 4 FCC Rcd at 2422.

nationwide reach, the fact that ABC, CBS, and NBC are "available to virtually all (98%) American television households."^{75/} An entity providing programming to a smaller group of interconnected stations would have far less, if any, market power as a purchaser of programming or a seller of advertising. Consequently, NTIA recommends that the Commission restrict considerably the definition of "network" for purposes of the dual network rule, perhaps employing the same narrow definition that it uses in applying the financial interest and syndication rules.^{76/}

Second, as the Commission points out, continued enforcement of the dual network rule may prevent network broadcasters from employing emerging technologies (e.g., video compression) to derive additional channels from their existing distribution systems.^{77/} This development would allow networks not only to make more efficient use of those distribution systems (including scarce radio spectrum), but also to experiment with innovative or more highly-targeted programming services.^{78/} NTIA agrees that

^{75/} Finsyn Report and Order, 6 FCC Rcd at 3109.

^{76/} For purposes of those rules, a "television network" is any person or corporation "providing on a regular basis more than fifteen (15) hours of prime time programming per week (exclusive of live coverage of bona fide news events of national importance) to interconnected affiliates that reach, in aggregate, at least seventy-five (75) percent of television households nationwide." Id. at 3166 (to be codified at 47 C.F.R. § 73.662(i)).

^{77/} Notice, 7 FCC Rcd at 4117.

^{78/} See id at 4118.

to the extent the dual network restriction discourages such activities, it disserves viewers and should therefore be modified.

We also believe, however, that the dual network rule should be modified in a way that will extend the promise of innovation beyond the networks to the "last mile" of the television distribution system -- the local broadcast stations that deliver programming to the home. The potential benefits of encouraging experimentation, efficiency, and innovation by broadcast networks will be realized many times over if broadcast stations can follow suit. NTIA is concerned that incentives for such innovation at the local level will be reduced, and inefficient spectrum use could occur, if a broadcast network can provide a second channel of programming merely by purchasing or affiliating with another group of local broadcast stations. On the other hand, if a network is permitted to offer its additional programming, if any, through its existing distribution system -- including its local affiliates -- the possible gains realized at the network level can also be reaped at the local level. Consequently, NTIA recommends that the Commission amend Section 73.658(g) to state that it shall not preclude a network from offering multiple channels of programming through a single television broadcast station in any television market.

VI. THE COMMISSION SHOULD REPEAL THE RULE BANNING NETWORK OWNERSHIP OF TELEVISION STATIONS IN SMALLER MARKETS

Section 73.658(f) of the Commission's rules precludes a network from owning television stations in areas where there are few television stations or the stations are of such unequal desirability that competition would be restrained by allowing such licensing.^{79/} The Commission adopted this rule for television in 1946^{80/} to prevent networks from "bottling up" the best broadcast facilities in small markets, thereby inhibiting the creation and growth of new networks and limiting the variety of network programming available to the viewers.^{81/} NTIA believes, however, that the dramatic changes in the television marketplace since 1946 have removed the rationale for the rule. Accordingly, its retention would not serve the public interest.

The most compelling market change has been the explosion in local outlets. When the rule was first adopted in 1946, there were only six television stations in the entire United States.^{82/} Today, as the Commission points out, even in the smaller markets, numerous broadcast television outlets exist. In television markets between 126 and 150, there are, on average, six over-the-

^{79/} 47 C.F.R. § 73.658(f) (1991).

^{80/} As with the dual network rule, this restriction was initially promulgated for radio in 1941.

^{81/} Notice, 7 FCC Rcd at 4118.

^{82/} See id.

air television signals.^{83/} Accordingly, even if each of the three national networks and Fox Broadcasting were to purchase a station in every market, outlets would likely remain for the establishment of other broadcast networks.

In addition, the proliferation of non-broadcast outlets has expanded opportunities for new networks and programming sources, addressing both competitive and diversity concerns. Cable television systems now provide numerous channels, carrying many of the more than 100 national and regional programming networks that are now available.^{84/} Opportunities for new programming will increase further, in both large and small markets, as the channel capacity of cable systems continues to grow and direct broadcast satellite service begins. The changes we propose to the dual networking rule can also provide opportunities for additional voices. In this environment, it is highly unlikely that repeal of Section 73.658(g) would hamper the growth of new networks or limit programming diversity.

The existing rule both lacks a basis in policy and has limited utility in practice. As the Commission notes, Section 73.658(g) has never been applied to prevent a network purchase of

^{83/} Id. at 4116-17.

^{84/} Id. at 4118.

a station.^{85/} Moreover, a network can readily avoid the rule's strictures by affiliating with a local station, even though the network can "bottle up" a desirable broadcast facility, in the sense the Commission seemed concerned about in 1946, about as effectively through affiliation as through acquisition. Because Section 73.658(f) has never been invoked, it is difficult to conclude that the rule's elimination will bring untoward consequences.

On the other hand, repealing Section 73.658(f) would produce some important benefits. Increased competition in the video marketplace has substantially reduced both revenues and profits for television broadcasters. These financial effects weigh most heavily on stations in smaller markets. In 1991, the average small market station (an entity directly affected by Section 73.658(f)) lost an estimated \$888,000.^{86/} Allowing networks to purchase stations in smaller markets could produce efficiencies in managerial, technical, and other operations that would improve

85/ See id. at 4118, n.62 (citing General-Times Television Corp., 13 Rad. Reg. 499 (1956); New Britain Broadcasting Co., 21 FCC 958 (1956); Hyman Rosenblum, 22 FCC 1432, 1441 (1957); St. Louis Telecast, Inc., 22 FCC 625, 738 (1957); Biscayne Television Corp., 22 FCC 1464, 1465 (1957); and National Broadcasting Co., Inc., 44 FCC 2098 (1960)). NTIA recognizes that this situation may be attributable, in part, to the national multiple ownership rule which, by limiting the number of stations a network could buy, reduced the number purchases that might trigger Section 73.658(f).

86/ 50% of Independent Stations and 25% of Affiliates Posted Big 1991 Losses, Communications Daily, Aug. 7, 1992, at 1 (citing National Association of Broadcasters, 1992 Television Financial Report).

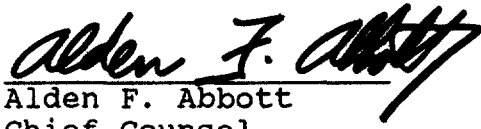
the financial viability and competitiveness of those stations. Network ownership of small-market stations might also permit improvements in program quality, including locally-produced news and information programming. In these ways, repeal of Section 73.658(f) would clearly benefit the viewing public.

VII. CONCLUSION

NTIA supports the Commission's attempt to remove or modify unnecessary regulations applicable to the television broadcast industry. Accordingly, NTIA respectfully requests that the Commission adopt the recommendations contained in its comments in this proceeding.

Respectfully submitted,

Gregory F. Chapados
Assistant Secretary for
Communications and Information


Alden F. Abbott
Chief Counsel

Thomas J. Sugrue
Deputy Assistant Secretary for
Communications and Information

Phyllis Hartsock
Deputy Chief Counsel

William F. Maher, Jr.,
Associate Administrator
Cheryl Glickfield
Lisa Leidig
Timothy Sloan
Office of Policy Analysis
and Development

National Telecommunications
and Information Administration

U.S. Department of Commerce
Room 4713
14th Street and Constitution Ave., N.W.
Washington, D.C. 20230
(202) 377-1816

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